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Supreme Court, U.S.
FILED

AUG 22 2002

OFFICE OF THE CLERK

No. 01-1368

IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

v.

WILLIAM HIBBS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 11, 2002
Certiorari Granted June 24, 2002

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RELEVANT DOCKET ENTRIES

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
CASE NO. CV-N-98-00205-HDM-(PHA)

1.	4/20/98	Complaint with Jury Demand filed.
2.	5/20/98	Motion to Dismiss filed by Defendants.
3.	6/12/98	Opposition to Motion to Dismiss filed by Plaintiff.
4.	7/2/98	Reply in Support of Motion to Dismiss filed by Defendants.
5.	7/21/98	Order (Defendants' motion to dismiss is denied without prejudice to renew in the form of a motion for summary judgment upon the close of discovery).
6.	7/28/98	Answer filed by Defendants.
7.	3/29/99	Motion for Partial Summary Judgment filed by Plaintiff.
8.	3/29/99	Motion for Summary Judgment filed by Defendants.
9.	3/31/99	Errata to Motion for Partial Summary Judgment filed by Plaintiff.
10.	4/16/99	Opposition to Defendants' Motion for Summary Judgment filed by Plaintiff.
11.	4/16/99	Opposition to Plaintiff's Motion for Partial Summary Judgment filed by Defendants.

12.	4/30/99	Reply to Motion for Partial Summary Judgment filed by Plaintiff.
13.	4/30/99	Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment filed by Defendants.
14.	6/3/99	Minutes Proceedings.
15.	6/3/99	Judgment (in favor of Defendants against Plaintiff).
16.	6/15/99	Notice of Appeal.

BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
DOCKET NO. 99-16321

1.	6/24/99	Cause docketed and appearances of counsel entered.
2.	10/18/99	Appellant's Opening Brief filed.
3.	11/18/99	Appellees' Brief filed.
4.	10/16/00	Clerk's letter sent to Solicitor General re: constitutionality of federal statute affecting public interest.
5.	11/22/00	Brief of the United States received.
6.	11/22/00	Motion of the United States for Leave to Intervene filed.

7.	11/24/00	Appellees' Motion for Leave to Respond to Brief of the United States filed.
8.	11/28/00	Order (The motion of the United States to intervene as of Right to Defend the Constitutionality of a Federal Statute is granted and its brief is ordered filed).
9.	12/26/00	Appellees' Supplemental Brief filed.
10.	2/28/01	Appellees' letter of additional citations filed; served on February 23, 2001.
11.	3/30/01	Appellees' letter of additional authority dated March 28, 2001, received.
12.	4/4/01	Motion for Leave to File Supplemental Brief filed by the United States.
13.	4/4/01	United States Supplemental Brief received.
14.	4/5/01	Appellees' Opposition to Motion of the United States for Leave to File Supplemental Brief filed.
15.	4/6/01	Order (The motion of the United States for leave to file supplemental brief is granted and the supplemental brief is ordered filed).

16.	4/6/01	Supplemental Brief filed by the United States.
17.	4/6/01	Appellees' Opposition to Motion of United States to File Supplemental Brief or in the Alternative Leave to Response to Supplemental Brief moot.
18.	4/9/01	Cause argued and submitted.
19.	4/10/01	Order (The parties shall, and amicus United States may, file concurrent supplemental briefs on the *Ex parte Young* issue within 21 days of this order).
20.	4/19/01	Appellees' Supplemental Brief filed.
21.	5/1/01	Appellant's Supplemental Brief filed.
22.	5/1/01	Appellees' Supplemental Brief deficient. Counsel notified.
23.	5/1/01	Case deemed submitted.
24.	5/7/01	Appellees' Supplemental Brief filed.
25.	12/11/01	Opinion: Reversed and Remanded.
26.	12/26/01	Appellees' Motion to Stay Issuance of Mandate Pending Filing of Petition for Certiorari filed.
27.	1/3/02	Appellant's Opposition to Motion to Stay Issuance of Mandate filed.

28.	1/8/02	Order (Issuance of the mandate is stayed pending the filing of a petition for writ of certiorari in the Supreme Court).
29.	1/10/02	Appellees' Reply to Appellant's Opposition to Motion to Stay Issuance of Mandate filed.
30.	1/15/02	Order (To United States District Court per motion of Defendants-Appellees, issuance of mandate is stayed pending filing of a petition for writ of certiorari in Supreme Court. The stay is granted).
31.	3/25/02	Received notice from Supreme Court, petition for writ of certiorari filed.

[Filed April 20, 1998]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM HIBBS,

CV-N-98-00205-HDM (PHA)

Plaintiff

vs.

COMPLAINT
DEMAND FOR JURY TRIAL

The Department of Human Resources, State of Nevada, CHARLOTTE CRAWFORD, in her official capacity as the DIRECTOR OF THE HUMAN RESOURCES DIVISION of the STATE OF NEVADA, and NIKKI FIRPO, in her office capacity as the Supervisor of the Reno Welfare Department,

Defendants.

_____/

Plaintiff, for his complaint against the Defendants, and each of them, alleges:

JURISDICTION AND VENUE

1. Plaintiff invokes this Court's jurisdiction under 28 U.S.C., Sections 1331, 1334, & 1337 on the ground that this action arises under the Family Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*, the Fourteenth Amendment to the United States Constitution. Plaintiff invokes this Court's

jurisdiction under the Declaratory Judgment Act, 28 U.S.C., Sections 2201 and 2202. Plaintiff invokes the Court's pendent jurisdiction over the related State and contract claims.

2. The venue of this action is properly placed in the District of Nevada pursuant to 28. U.S.C., Section 1391 because Plaintiff's claim arises in this district.

PARTIES

3. Plaintiff is a citizen of the United States and resides in Virginia City, Storey County, Nevada.

4. The Division of Human Resources and the Welfare Department are divisions of the State and public agencies and the employer of the Plaintiff.

5. Charlotte Crawford is the Director of the Division of Human Resources, which is the agency within which the Welfare Department is administered.

6. Nikki Firpo is the Director of the Welfare Department in Washoe County and signed the letter of termination of Mr. Hibbs.

STATEMENT OF THE CASE

7. Plaintiff is a citizen of the United States and was employed by the State of Nevada, Department of Social Services as an Eligibility worker beginning February 6, 1995. In June 1997, Plaintiff was informed by a medical doctor and a psychiatrist that his wife would require full time care because of a serious medical condition. He was informed that this full time care would be required until her surgery which was scheduled in November 1997. Mr. Hibbs informed his employer on June 30, 1997, and was told that he would be given leave until the situation was resolved or until December 30, 1997. On October 22, 1997,

Mr. Hibbs was approved for another 200 hours of leave based upon his wife's continued serious illness. In November 6, 1997, he was informed that he was being terminated. He was denied a meaningful hearing and denied an appeal of this decision. His termination was effective on December 22, 1997. Mr. Hibbs was informed that he was terminated for failure to report to work.

8. On December 22, 1997, three days before Christmas, Mr. Hibbs was informed that he had been terminated by the State of Nevada. Mr. Hibbs believed that he was subject to termination but had the right to another hearing. The hearing he was provided was titled "pre-disciplinary hearing." He repeatedly asked if he could cure the reason for dismissal and return to work but was denied that opportunity and his dismissal was recommended. Believing that this administrative step was a recommendation for dismissal, Mr. Hibbs filed a grievance regarding the termination recommendation on January 7, 1998, pursuant to Nevada statute. On March 20, 1998, the Administrative Hearing Officer ("AHO") for the State of Nevada dismissed the appeal stating that he had no jurisdiction because Mr. Hibbs had failed to file his appeal within ten (10) days of the dismissal. Whereas, the Attorney General deemed the grievance filing the equivalent of an appeal, the Administrative Hearing Officer dismissed whatever efforts Mr. Hibbs had made to perfect is claim.

9. The Plaintiff brings this action, thus, because the Defendants have acted in derogation of the Family Medical Leave Act ("FMLA"), in derogation of his Fourteenth Amendment rights of substantive and procedural due process, which are applicable to the State of Nevada. The Plaintiff's pendent claims also include a violation of the Plaintiff's rights under the Constitution of the State of Nevada and violation of the Nevada Revised Statutes,

Section 284 *et seq.* The Defendant has also subjected the Plaintiff to the intentional infliction of emotional distress.

STATEMENT OF FACTS

10. On February 6, 1995, William Hibbs was hired by the Department of Human Resources, Division of Welfare, State of Nevada as a Social Worker.

11. Mr. Hibbs completed all the training required of him during his tenure in this position. He received commendations, awards, excellent evaluations, and no written reprimands from his supervisors.

12. In June 1997, Mr. Hibbs had been a full-time, permanent employee of the State of Nevada for more than twelve (12) months. Mr. Hibbs had worked at least 1,250 hours over the previous twelve (12) months, June 30, 1996, through July 1, 1997. The State of Nevada is a public agency as defined by the FMLA.

13. In June 1997, Mr. Hibbs made a request for leave based upon the serious illness of his wife and her need for full time care. This medical emergency was documented by letters from medical and psychiatric doctors familiar with Mrs. Hibbs' condition. These reports were submitted to the State of Nevada. No challenge was ever made by the State of Nevada to any of these medical reports. Monthly medical reports were submitted to the State of Nevada by Mr. Hibbs.

14. On June 23, 1997, the State of Nevada approved medical leave through December 31, 1997. Mr. Hibbs began his leave on July 29, 1997. Mr. Hibbs stated to his supervisor that he would return on January 5, 1998.

15. On or about the middle of October 1997, he was informed that he had to reapply for further leave. He was

also informed that his fellow employees would donate the time so that he could continue his leave. Over three hundred (300) hours were donated.

16. On October 22, 1997, Mr. Hibbs was approved by the State of Nevada Personnel Office for another two hundred (200) hours of catastrophic leave.

17. On November 6, 1997, Mr. Hibbs was directed by his supervisor to attend a meeting at her office to discuss his wife's condition, which he did and explained in detail the failed surgery at Stanford University, the prognosis, the rehabilitation for pain medication addiction, and the future corrective surgery to be accomplished in November 1997 in Arizona, and his intention to return to work on January 5, 1998, no matter the result of the surgery because funds would become available to pay for his wife's full time care. The memorandum of this meeting was published with the details of his wife's condition and the details of the award of the malpractice settlement to the Hibbs, all in blatant disregard of the Hibbs' right to privacy and a breach of the confidentiality of the employee-employer relationship.

18. On November 6, 1997, Mr. Hibbs' supervisor went to his home, again breaching his privacy and that of his family, and delivered a letter from the supervisor to Mr. Hibbs notifying him that his leave had been exhausted and that he had to report to work by November 12, 1997, or be terminated. His immediate supervisor was well aware of the fact that he had no full time care for his wife. When he asked why his leave had not been approved, his supervisor also stated to him that she had no authority to determine the status of his leave.

19. On November 13, 1997, the Supervisor again went to the Hibbs' family home to deliver another letter of

discipline. She stated that she knew of no reason that his request for leave had been denied.

20. On December 8, 1997, Mr. Hibbs was notified by his supervisor that she intended to terminate him. He again asked why his medical leave granted to him was not effective. He asked if he could return to work and cure the problem and he was refused. Mr. Hibbs was told he would be given a "pre-disciplinary hearing."

21. On December 19, 1997, Mr. Hibbs was told that his pre-disciplinary hearing would take place at the office of the Welfare Department. He again asked if he could return to work to cure the problem and he was told that he could not return to work.

22. On December 22, 1997, Mr. Hibbs was given a determination of dismissal that had been altered to change the date from December 19, 1997, the date of his pre-disciplinary hearing to December 22, 1997, the date of the alleged decision by the hearing officer.

23. On January 7, 1998, Mr. Hibbs filed a grievance with his supervisor as required by statute requesting the right to return to work and other requests for relief.

24. On January 8, 1998, the Attorney General representing the Welfare Department referred the grievance to the Hearing Officer stating it was not a grievance because the employee was terminated without an appeal. Mr. Hibbs relied upon the Attorney General's designation of his filing as an appeal.

25. On March 20, 1998, after motion practice by counsel for Mr. Hibbs and the Attorney General, the Administrative Hearing Officer ("AHO") dismissed the appeal with prejudice stating that the AHO lacked jurisdiction to hear

this matter because the filing was not in the form of an appeal, but filed as a grievance.

26. Mr. Hibbs has filed the case for violation of his rights under the FMLA and for denial of due process by the acts of the State of Nevada in all the procedural aspects of terminating his position as an employee.

FIRST CLAIM FOR RELIEF

(FMLA, 29 U.S.C. § 2601 *et seq.)*

27. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1-26

28. In July 29, 1997, Plaintiff began a leave of absence from his full time, permanent position with the State of Nevada to provide full time care for his spouse who had a serious medical condition.

29. Each month after he began his leave, Plaintiff furnished to the State of Nevada, Social Services Department, reports from doctors explaining the serious medical condition of Mr. Hibb's spouse and her need for full time care.

30. On November 6, 1997, Mr. Hibbs, at the request of his supervisor further described in detail the serious health condition of his spouse and why he had made arrangements so that he could return to work by January 5, 1998.

31. The letter from the State of Nevada approving his leave granted intermittent leave until December 30, 1997. The letter failed to designate the leave in quantity and assignment until Mr. Hibb's projected return in January of 1998.

32. Another letter dated October 22, 1997, granted Plaintiff another 200 hours of leave again failing to

designate the leave granted and the amount remaining and, therefore, denying Mr. Hibbs his entitlements under State and Federal law.

33. Plaintiff requested the use of his additional leave granted and was denied without reason and without an accounting and proper designation of his leave.

34. Plaintiff was terminated in retaliation for his request for leave.

35. The State of Nevada has failed to properly account for and notify Mr. Hibbs of the means to use FMLA leave in conjunction with leave provided by statute in Nevada as required by State and federal law. The State of Nevada failed to properly account for Mr. Hibbs' leave and failed to inform Mr. Hibbs of the appropriate designation of his leave. The State failed to give Mr. Hibbs notice of leave and the use of leave and failed to include such notice in his personnel file as required by the FMLA and by State statute.

36. Plaintiff has been required to retain counsel to prosecute the claims against Defendants herein and is entitled to his attorneys fees and costs.

37. Plaintiff has suffered hardship and damages due to his termination according to proof at trial.

SECOND CLAIM FOR RELIEF

(Violation of rights under Fourteenth Amendment)

38. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1–38.

30. Plaintiff was a permanent, classified, full-time employee of the State of Nevada pursuant to NRS, § 284.385.

40. He was entitled to a hearing pursuant to NRS § 284.390 and Mr. Hibbs was denied that hearing by the act of the AHO in dismissing his appeal with prejudice.

41. Mr. Hibbs attended a hearing termed "a pre-termination hearing" but was told that he had already been terminated. He was denied the right to review the documents and information upon which the State of Nevada used to terminate his employment. He was denied the right to review the documents used by the individual representing the State who determined that the termination was reasonable all in violation of State law and, therefore, a violation of Mr. Hibbs' due process rights under the United States Constitution.

42. Plaintiff has been required to retain counsel to prosecute the claims against the Defendants herein and is entitled to his attorneys fees and costs.

43. Mr. Hibbs has suffered hardship and damages due to the violation of his substantive and procedural due process rights to be shown by proof at trial.

THIRD CLAIM FOR RELIEF

(Violation of due process rights under State Constitution)

44. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1–43.

45. Plaintiff was deprived of his employment in which he has a property right without a hearing and without the documentation upon which the State of Nevada based its determination to terminate and upon which the State of Nevada determined that the termination was reasonable.

46. Plaintiff has been required to retain counsel to prosecute the claims against the Defendants herein and is entitled to his attorneys fees and costs.

47. Mr. Hibbs has suffered hardship and damages for this denial of his State constitutional rights to be shown by proof at trial.

FOURTH CLAIM FOR RELIEF

(Violation of rights granted by Statute in the State of Nevada, Chapter 284)

48. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1 through 47.

49. Full-time employees' leave status is determined by the interpretation of Chapter 284 as found in Nevada Administrative Code (NAC) 284. Mr. Hibbs was caring for a family member as provided in NAC 284.558 with a serious health condition as provided in NAC 284.5239. Mr. Hibbs met the requirements of NAC 284.576 and was granted leave through December 1997. He reported that he would return to work on January 5, 1998. He was granted 200 more hours of leave on October 22, 1997, that further extended his leave. He advised his supervisor on November 6, 1997, that he would return to work on January 5, 1998.

50. The State of Nevada failed to maintain accurate records and make an accounting to Mr. Hibbs' of his leave during the period of his leave in violation of NAC 284.5813.

51. The State of Nevada failed to return Mr. Hibbs' to his position in violation of NAC 284.5815.

52. In connection with the termination of Plaintiff's employment, Plaintiff further alleges that Defendants failed to act in compliance with its own written adopted policies as set out in the Nevada Administrative Code and failed in its termination of Plaintiff to act in good faith and with fair dealing toward Plaintiff.

53. Plaintiff has been required to retain counsel to prosecute the claims against Defendants herein and is entitled to his attorneys fees and costs.

54. Plaintiff suffered hardship and damages as will be shown according to proof at trial.

FIFTH CLAIM FOR RELIEF

(Intentional Infliction of Emotional Distress)

55. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1 through 54.

56. Defendants knew the circumstances of Plaintiff's request for leave was the serious health condition of his wife. Defendants knew that the Plaintiff's wife had to have further surgery to correct the serious health condition. Defendants knew that the Plaintiff's wife was scheduled for that surgery in November 1997. Defendants knew Plaintiff had stated he would return to work on January 5, 1998. Knowing these facts, Defendants chose to unlawfully terminate Plaintiff from his position in blatant disregard for the circumstances and the State's own adopted policy and law.

57. Defendants continued to violate Plaintiff's rights by denying him a hearing and terminate his position three days before the Christmas holiday.

58. Plaintiff has been required to retain counsel to prosecute the claims against Defendants herein and is entitled to his attorney's fees and costs.

59. Plaintiff has suffered emotional distress, hardship and damages that will be shown according to proof at trial.

SIXTH CLAIM FOR RELIEF

(Declaratory Relief)

60. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1–59.

61. A controversy has arisen in which the Plaintiff's rights have been violated and a declaration of that violation by the Court is sought.

WHEREFORE, Plaintiff prays this Court enter an order providing as follows:

1. For back pay due and owing to Plaintiff for the wrongful termination in excess of TEN THOUSAND DOLLARS ($10,000.00);

2. For general damages in excess of TEN THOUSAND DOLLARS ($10,000.00);

3. That a declaratory judgment be issued that Plaintiff's rights have been violated as alleged above;

4. That Plaintiff be reinstated in his prior position or an equivalent position with all benefits retroactively made available;

5. That Plaintiff have and recover from the Defendants, jointly and severally, compensatory damages, liquidated, exemplary, punitive damages and such other monetary relief as may be deemed appropriate in amounts to be determined at trial;

6. That Plaintiff recover from Defendants, jointly and severally, prejudgment interest to the maximum extent permitted by law;

7. That Plaintiff recover from the Defendants, jointly and severally, his costs, including reasonable attorneys'

fees, together with such other remedies as may be provided by law;

8. Pursuant to Federal Rules of Civil Procedure, Rule 38, Plaintiff demands a trial by jury on all issues of fact in this action;

9. That the Court grant such other and further relief as it deems just and proper.

DATED this 20th day of April 1998.

ZEH, POLAHA, SPOO, HEARNE &
PICKER

By: /s/ Treva J. Hearne
TREVA HEARNE
Nevada Bar #4450
Attorneys for Plaintiff
575 Forest Street
Reno, Nevada 89509

STATE OF NEVADA)
) SS
COUNTY OF WASHOE)

WILLIAM HIBBS hereby affirms, under penalty of perjury, that the assertions of this affidavit are true;

That is the Plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and, as to those matters, he believes them to be true.

/s/ Willaim Hibbs
WILLIAM HIBBS

Subscribed and sworn to before me

this 20th day of April, 1998.

/s/ Carol Elewski
Notary Public

[Filed July 28, 1998]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM HIBBS,	)
	) **CV-N-98-00205-**
	) **HDM-(PHA)**
Plaintiff,	)
	)
vs.	)
	) **ANSWER**
The Department of Human Resources, State of Nevada, CHARLOTTE CRAWFORD, in her official capacity as the DIRECTOR of the HUMAN RESOURCES DIVISION of the STATE OF NEVADA, and NIKKI FIRPO, in her official capacity as the Supervisor of the Reno Welfare Department,	)
Defendants.	)

Defendants, STATE OF NEVADA, ex. rel. its DEPARTMENT OF HUMAN RESOURCES, CHARLOTTE CRAWFORD, and NIKKI FIRPO, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, hereby answers the Complaint in the above-captioned matter as follows:

JURISDICTION AND VENUE

1. Admit.

2. Admit.

PARTIES

3. Admit.

4. It is admitted that the Department of Human Resources and its Welfare Division are agencies of the State of Nevada and that the Plaintiff was employed by the Welfare Division. All other material allegations are denied.

5. It is admitted that Defendant Charlotte Crawford is the Director of the Department of Human Resources and that the Welfare Division is a division of the Department of Human Resources. All other material allegations are denied.

6. It is admitted that Defendant Nikki Firpo is employed by the Welfare Division as a Social Welfare Manager IV and is the manager of the Reno District Office of the Welfare Division. All other material allegations are denied.

STATEMENT OF THE CASE

7. It is admitted that Plaintiff began working for the Welfare Division as an Eligibility Certification Specialist on or about February 6, 1995. Defendants are without sufficient knowledge or information to either admit or deny allegations regarding what Plaintiff was told by medical and psychiatric professionals regarding his wife's condition and deny those allegations on that basis. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical leave Act (FMLA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. It is admitted that Plaintiff's termination was effective December 22, 1997. It is admitted that Plaintiff was terminated from his position with the Welfare Division because he violated various provisions of the Nevada Administrative Code (NAC) and the

Department of Human Resources Prohibitions and Penalties that stemmed from his absence from his job without leave. All other material allegations are denied.

8. It is admitted that Plaintiff was given his final notice of termination on December 22, 1997. Defendants are without sufficient knowledge or information to either admit or deny allegations regarding what Plaintiff believed, and deny those allegations on that basis. It is admitted that Plaintiff was provided with a Pre-Disciplinary Hearing. It is admitted that Plaintiff, through his attorney, filed a grievance on January 7, 1998. It is admitted that on March 20, 1998, Plaintiff's appeal before the Nevada Personnel Commission of his termination was dismissed for "want of subject matter jurisdiction." All other material allegations are denied.

9. Denied.

STATEMENT OF FACTS

10. It is admitted that Plaintiff began working for the Welfare Division as an Eligibility Certification Specialist on or about February 6, 1995. All other material allegations are denied.

11. It is admitted that Plaintiff completed all the training that he was assigned during his tenure with the Welfare Division. Defendants are presently without sufficient information or knowledge to either admit or deny whether Plaintiff received commendations, awards, or excellent evaluations, and deny these allegations on that basis. All other material allegations are denied.

12. It is admitted that Plaintiff began working for the Welfare Division as an Eligibility Certification Specialist on or about February 6, 1995. Defendants are presently without sufficient information or knowledge to either admit

or deny whether Plaintiff worked at least 1,250 hours between June 30, 1996 and July 1, 1997, and deny these allegations on that basis. It is admitted that the State of Nevada is a public agency as defined in 29 U.S.C. § 203(x). All other material allegations are denied.

13. It is admitted that prior to June 23, 1997, a Request for Family or Medical Leave on behalf of Plaintiff was lodged with the Welfare Division, and that this request was because of a serious health condition affecting Plaintiff's spouse. It is admitted that on or about October 17, 1997, several medical reports concerning Plaintiff's spouse were received by the Welfare Division. All other material allegations are denied.

14. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical Leave Act (FLMA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. It is admitted that on at least one occasion Plaintiff stated that he did not intend to return to work until January 5, 1998. All other material allegations are denied.

15. It is admitted that on or about the middle of October, 1997, Plaintiff was informed that as of October 1, 1997, he had exhausted his 12 weeks of FMLA and was asked whether he wanted to return to work or to request additional catastrophic leave. All other material allegations are denied.

16. It is admitted that on or about October 21, 1997, Plaintiff's request for 200 additional hours of catastrophic leave was approved by the Welfare Division and forward to the Department of Human Resources for approval by the Director and that on or about November 5, 1997, the request was returned to the Welfare Division without being

approved by the Director. All other material allegations are denied.

17. It is admitted that early in the day on November 3, 1997, Plaintiff called the Welfare Division's Reno District Office regarding setting up a meeting regarding his job status and an update of his wife's medical condition. It is admitted that this meeting took place on November 3, 1997, at 350 South Center Street, Suite 260 at approximately 1:15 p.m. It is admitted that Plaintiff's wife's medical condition and future treatment needs were discussed. It is admitted that Plaintiff stated he thought ideally he would be able to return to work by January 5, 1998. All other material allegations are denied.

18. It is admitted that on November 6, 1997, Defendant Nikki Firpo hand delivered a Letter of Instruction dated November 6, 1997 to Plaintiff's home directing him to report for work by November 12, 1997, and that a failure to do so would result on disciplinary action. All other material allegations are denied.

19. It is admitted that on November 13, 1997, Defendant Nikki Firpo hand delivered a Written Reprimand to Plaintiff's home for failing to report to work on November 12, 1997, along with a written request for him to return to work immediately. All other material allegations are denied.

20. It is admitted that on December 8, 1997, Plaintiff was served with a Specificity of Charges in which the recommended discipline was termination. It is admitted that Plaintiff was told he would be given a pre-disciplinary hearing. All other material allegations are denied.

21. It is admitted that Plaintiff's pre-disciplinary hearing was scheduled and held on December 19, 1997. All other material allegations are denied.

22. It is admitted that Plaintiff was given his final notice of termination on December 22, 1998. All other material allegations are denied.

23. It is admitted that Plaintiff, through his attorney, filed a grievance on January 7, 1998. All other material allegations are denied.

24. It is admitted that on January 8, 1998, the undersigned counsel stated in a letter to Plaintiff's counsel that "I will not be responding to the allegations in Mr. Hibbs' grievance because only permanent employees may utilize the grievance procedure. *See* NAC 284.658. Mr. Hibbs is no longer a permanent employee and can no longer file grievances. Accordingly, the relief sought in the grievance is denied." . . . "However, your January 7, 1998 letter and grievance will be construed as an appeal of the December 19, 1997 hearing, and will be forwarded to the Nevada Department of Personnel for their consideration and action." Defendants are presently without sufficient knowledge or information to either admit or deny allegations regarding to what Plaintiff relied upon regarding the filing of his personnel appeal. All other material allegations are denied.

25. It is admitted that on March 20, 1998, Plaintiff's appeal before the Nevada Personnel Commission of his termination was dismissed for "want of subject matter jurisdiction." All other material allegations are denied.

26. Denied.

FIRST CLAIM FOR RELIEF

FMLA, 29 U.S.C. § 2601, *et seq.*)

27. Defendants restate and incorporate by reference as is set forth in their entirety paragraphs 1-26 of their Answer.

28. It is admitted that after July 29, 1997, Plaintiff did not again work full time for the Welfare Division. Defendants are presently without sufficient information or knowledge to either admit or deny the reason why Plaintiff remained away from his position at the Welfare Division after July 29, 1997, and deny those allegations on that basis. All other material allegations are denied.

29. It is denied that Plaintiff furnished the Welfare Division with medical reports concerning his wife on a monthly basis. It is admitted that Plaintiff intermittently furnished the Welfare Division with medical reports concerning his wife. All other material allegations are denied.

30. Denied.

31. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical Leave Act (FLMA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. All other material allegations are denied.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

SECOND CLAIM FOR RELIEF

(Violation of rights under Fourteenth Amendment)

38. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-37 of their Answer.

30. [sic] Admit.

40. It is admitted that Plaintiff was entitled to a post-termination hearing pursuant to NRS 284.390. All other material allegations are denied.

41. It is admitted that Plaintiff attended his pre-termination hearing on December 19, 1997. All other material allegations are denied.

42. Denied.

43. Denied.

THIRD CLAIM FOR RELIEF

(Violation of due process rights under State Constitution)

44. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-43 of their Answer.

45. Denied.

46. Denied.

47. Denied.

FOURTH CLAIM FOR RELIEF

(Violation of rights granted by Statute in the State of Nevada, Chapter 284)

48. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-47 of their Answer.

49. It is admitted that NRS 284 and NAC 284 address the leave status of State employees. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical Leave Act (FMLA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. It is admitted that Plaintiff was granted approximately 378 hours of catastrophic leave donated from other employees of the Welfare Division. It is admitted that from January 1, 1997, through November 30, 1997, Plaintiff was absent from his job a total of approximately 921.25 hours. It is admitted that on at least one occasion Plaintiff stated that he did not intend to return to work until January 5, 1998. All other material allegations are denied.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

FIFTH CLAIM FOR RELIEF

(Intentional Infliction of Emotional Distress)

55. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-54 of their Answer.

56. It is admitted that Plaintiff informed the Welfare Division that he was requesting leave to care for his seriously ill spouse and that on at least one occasion Plaintiff informed the Welfare Division that his spouse was scheduled for surgery in November, 1997. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical Leave Act (FMLA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. It is admitted that on at least one occasion Plaintiff stated that he did not intend to return to work until January 5, 1998. All other material allegations are denied.

57. It is admitted that Plaintiff was given his final notice of termination on December 22, 1997. All other material allegations are denied.

58. Denied.

59. Denied.

SIXTH CLAIM FOR RELIEF

(Declaratory Relief)

60. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-59 of their Answer.

61. Denied.

AFFIRMATIVE DEFENSES

1. The plaintiff's complaint fails to state a claim upon which relief can be granted.

2. Defendants at all relevant times acted in good faith toward plaintiff. Therefore, defendants are entitled to qualified good faith immunity from damages.

3. Defendants are immune from liability as a matter of law.

4. Defendants acted at all relevant times in accordance with applicable law and procedures which are constitutionally required.

5. Plaintiff's damages, if any, are the result of his own intentional and/or negligent acts and he is solely responsible for the matters alleged.

6. The negligence of the plaintiff caused or contributed to any injuries or damages which plaintiff may have sustained, and the negligence of these defendants, if any, requires that the damages of plaintiff be denied or diminished in proportion to the amount of negligence attributable to plaintiff.

7. Fairness and constitutional due process require that punitive liability and damages be proven by clear and convincing evidence.

8. Punitive damages, if any are awarded, must be reduced by reason of any fault of plaintiff and the circumstances under which this action arose.

9. The plaintiff has failed to mitigate his losses and damages, if any there were.

10. Any and all claims which occurred prior to two (2) years of the filing of plaintiff's complaint are barred by the statute of limitations.

11. This action against the Defendants is barred by the Eleventh Amendment to the United States Constitution. Also, the Defendants are entitled to sovereign immunity pursuant to Chapter 41 of the Nevada Revised Statutes.

12. Defendants cannot be sued while acting in their official capacity in a civil rights action.

13. Some or all of the named defendants were not personally involved and/or the cause and fact and proximate cause of plaintiff's alleged constitutional deprivations.

14. Plaintiff has not exhausted available administrative remedies.

15. Plaintiff's claims are barred by the doctrines of *collateral estoppel* and *res judicata*.

WHEREFORE, defendants pray as follows:

(1) That plaintiff take nothing by virtue of his complaint.

(2) That the defendants have judgment for their costs and attorney fees as determined by law.

(3) For such other and further relief as the Court may deem just and proper.

DATED this 28th day of July, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By /s/ Charles Hilsabeck
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